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Black Women, Gender Equity and the Function at the Junction

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BLACK WOMEN, GENDER EQUITY AND THE FUNCTION AT THE JUNCTION

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After teaching sports law for several years, I am struck that few people can articulate a coherent general thesis of what gender equity means or a clear vision of what the athletic picture will look like when it has been attained.[1] The law of gender equity, however, is not so difficult to find. The Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1983 (§ 1983) and Title IX of the Civil Rights Act of 1964, as amended by the Education Amendments of 1972,[2] are the major sources of American gender equity law.[3] The Equal Protection Clause has been used to address gender based discrimination in government sponsored athletics activities. Section 1983 has been used to challenge the exclusion of girls from sports activities using public facilities. Title IX, which is among the legislative progeny of Equal Protection jurisprudence, has been used to address disparities in the treatment of boys and girls in athletic programs within educational systems that receive federal funding.[4]

 Professor of Law, University of New Mexico. This essay is dedicated to my sister Mary Elizabeth Davis, who proudly wore the maroon and gold for the Trojanettes basketball team of the now defunct W.A. Pattillo High School in Tarboro, North Carolina. I wish to thank my research assistant, Victoria Perdue, without whom this essay could not have been completed.

1. *See* B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 WIS. L. REV. 647; Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105 (1990). Scholars are not the only ones in the dark. Administrators have expressed similar comments. Dick Shultz, former Executive Director of the NCAA, in an interview after the 87th NCAA convention in 1993 stated that gender equity was one of the most important issues facing the organization's members. He added: "First of all, we've got to define gender equity." Larry McMillen, *NCAA Quietly Sets Agenda at Convention*, NEW ORLEANS TIMES-PICAYUNE, Jan. 17, 1993, at C6.

2. 20 U.S.C. §§ 1681 et seq. (1994).

3. Several states have Equal Rights Amendments in their constitutions that also have been applied in gender equity cases. *See, e.g.*, Williams v. School Dist. of Bethlehem, 998 F.2d 168 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 689 (1994); Blair v. Washington State Univ., 740 P.2d 1379 (Wash. 1987). For a history of gender equity litigation, see Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992).

4. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any *education program or activity receiving Federal financial assistance.*" Education Amendments of 1972, Pub. L. No. 92-318, § 901, 444 (1972) (emphasis added).

In my view, the difficulty in defining gender equity results in part because gender equity principles, rooted in equality jurisprudence, are applied to a setting in which a normative goal is the attainment of inequality. The ultimate objective of athletics competition is superiority.[5] Considering this inherent contradiction, it is no wonder that there is such debate over whether gender equity precludes any discrimination based on gender, as many males argue,[6] or means the remediation of the historical discouragement and exclusion of girls and women from participation in athletics competition.[7]

The lack of coherent principles is exemplified by the intersection of gender equity with racial justice. Some commentators, for example, have argued that gender equity results in the displacement of Black males with middle and upper class white women.[8] Professors Weiler and Roberts have observed some interesting racial dynamics of gender equity in practice. They note that Black student athletes, both men and women, are concentrated in sports generating over ninety percent of the total revenue in NCAA Division 1-A.[9] Their subtle observation is that the current regime results in a transfer of wealth from poor Blacks to middle class Whites. They leave unstated the obvious implication from the inclusion of this observation in their discussion of gender equity. To the extent that legal rules underlying gender equity compel the creation of additional non-revenue sports for women in educational institutions, Black student athletes, and Black males in particular, have been required to fund them.

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5. This is perhaps the male model of competitive athletics. Some commentators have questioned its use as the standard for the development of athletics for competitive athletics for women. *See, e.g.*, Olson, *supra* note 1, in which the author provides a history of women's athletics in the twentieth century and argues, among other things, that sports as an institution may be different for women.

6. Kelley v. Board of Trustees of Univ. of Ill., 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 938 (1995).

7. Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993).

8. Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on a Student Body Ratios*, 71 U. DET. MERCY L. REV. 845 (1994).

9. PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 623 (1993). They relied upon data drawn from the American Institutes for Research, *Studies of Intercollegiate Athletics, Report No. 3: The Experiences of Black Intercollegiate Athletes at NCAA Division 1 Institutions* (1989), which show that Black males constituted 37% of football players, 56% of men basketball players and 33% of women basketball players, while Black men and women comprised only 8% of the student athletes in the nonrevenue sports. *See also* T. Jesse Wilde, *Gender Equity in Athletics: Coming of Age in the 90's*, 4 MARQ. SPORTS L.J. 217, 250 (1994).

I do not propose to address in any substantial way the effect of gender equity on Black males in this essay.[10] Nor do I intend to present a coherent thesis of gender equity as my views are still in an evolutionary stage. This article is not an attack on gender equity, and readers who hope to find fodder to slow down its momentum will be disappointed. I am, however, going to examine the meaning of gender equity for Black women and sketch a general framework for principles to aid the formulation of sports policy on gender equity as it applies to Black women. This framework may illumine ideas useful in evolution of the related law of gender equity as well, but any such effect would be a mere by-product of the roughly shaped ideas I express below.

I. GENDER EQUITY AND BLACK WOMEN: THE INTRODUCTION

In *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, Wendy Olson observed that Title IX "has done little to address the diverse needs and problems . . . of women of color . . ."[11] She discussed some of the theories explaining the lack of participation of Black girls and women at the high school and collegiate level.[12] Her intent was to acknowledge her awareness of its existence.[13] Scholars such as Kimberle Crenshaw and Angela Harris have provided theoretical frameworks for analyzing this problem, although they have not yet focused on women of color in sports. Professor Crenshaw in *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*,[14] and Professor Harris in *Race and Essentialism in Feminist Legal The-*

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10. I recognize that Black males suffer and have suffered from racial discrimination in American sports systems. There is ample literature on this subject. *See, e.g.*, Linda S. Greene, *The New Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS UNIV. L.J. 101 (1984); Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615 (1995). In this article, I wish to acknowledge that Black women, too, have suffered from the forces of discrimination.

11. Olson, *supra* note 1, at 127.

12. See text *infra* at 11. Olson's own view was that the Black girls and women chose not participate because of the lack of professional opportunities. Olson, *supra* note 1, at 128. The apparent argument is that Black boys and men chose athletics in the numbers that they do because it provides a pathway to success. That pathway is not available to Black girls and women, so they choose other routes.

13. Olson cited some observations set forth in THE WOMENS SPORTS FOUNDATION, THE WSF REPORT: MINORITIES IN SPORTS (1989) on differences in the effect of sports on women of color. For example, the data in the Report indicated that Black women who participated in high school athletics encountered difficulty in entering the work force outside athletics, and that Hispanic women who participated in high school sports benefitted from that participation more so than any other group.

14. 1989 UNIV. CHI. L. F. 139.

ory,[15] argue that conventional race based antidiscrimination theory and feminist theory ignore the intersectionality of race and gender and thus provide an inadequate framework for fully addressing the needs of women of color.

I do not claim to "get it," but I, nevertheless, am going to attempt to draw upon the theoretical propositions advanced by Professors Crenshaw and Harris. I am intrigued by their use of mathematical models to describe the legal intersection of race and gender and the concept of essentialism. Although Professors Crenshaw and Harris outline general approaches to the needs of sundry groups of women of color, their emphasis is on Black women, and I would venture to say that they would maintain that legal rules which address Black women might not necessarily be appropriate for other women of color. I will follow that conclusion and limit the analysis and propositions set forth here to Black women except as I otherwise indicate. Both works reach similar conclusions.

Professor Crenshaw argues that conventional antidiscrimination law employs a single axis model that does not account for the multiple physical and experiential dimensions of Black women, including but not limited to, race and gender.[16] Conventional legal analysis uses a single axis analysis to examine the action of the force of discrimination on one dimension at a time.[17] The use of the single axis leads to mathematical descriptives to describe the dimensions of the social phenomenon of the Black woman. The descriptives are necessarily linear equations, each of which denote a vertical or horizontal line. I had originally thought the linear equations and the vertical and horizontal lines might enhance an explanation of the intersection of race and gender. For example, if the experiences of Black women were two dimensional, they could be described by a vertical race line and a horizontal gender line, or vice-versa. My observation that the intersection occurs at a single point on both lines underscores the inadequacy of the single axis analysis, but somehow does not clearly illuminate Professor Crenshaw's argument.

Professor Harris' analysis is similar and explicitly utilizes linear equations to explain the law's treatment of Black women.[18] She used independent variables or elements where Professor Crenshaw used

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15. 42 STAN. L. REV. 581 (1990).

16. Crenshaw, *supra* note 14.

17. Legal rules consist of elements that are analyzed separately. Factual circumstances relevant to a given element are analyzed to see if the requisite element is present.

18. Harris, *supra* note 15, at 588. "The result of essentialism is to reduce the lives of people who experience multiple forms of oppression to addition problems: 'racism + sexism =

dimensions. The number of elements in the equation may be infinite. She observed that the law's treatment of Black woman as a sum of several independent elements, and her legal rights depend upon each one.[19] The observation suggests that legal rules treat the Black woman's life as a "mixture" of physical and experiential elements, including but not limited to, race, gender, and sexuality; the law through conventional legal analysis uses some sort of magnetic or other attractive force to deal with one element at a time to the exclusion of other elements. Professor Harris uses the concept of "essentialism"[20] to make her point. Each element in the equation has an essential character that may be far different than what a Black woman is. The essence of gender is a white woman model;[21] the essence of Blacks is a Black male model.[22]

When the two analyses are studied together, the physical phenomena they describe is more important than the mathematical descriptives. Professor Crenshaw's multidimensional analysis reveals an interaction of race and gender that is much larger and more complex than a single point. The attention to the intersection distracts from the action occurring at the intersection. Professor Harris' analysis indicates that Black women, or any group for that matter, is better described by more complex functions, i.e., Black women = *f*(race x gender x sexuality). What both scholars demonstrate is that antidiscrimination jurisprudence is misled by this complex function, which distracts from the action at the intersection or the "function at the junction."

The two works demonstrate that the forces of race and gender discrimination act simultaneously or sequentially on Black women. Professor Crenshaw, in fact, uses the metaphor of an accident at an intersection to show this idea.[23] The confluence of the forces normally should be expected to produce greater harm than either force acting alone. More importantly, the simultaneous forces may cause an injury that in many cases may be different from that which would occur from either force

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straight black women's experience,' or 'racism + sexism + homophobia = black lesbian experience."

19. *Id.*

20. Professor Crenshaw draws upon the works of Catherine MacKinnon and Robin West. *Id.* at 585-95. "Essentialism' is "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." *Id.* at 585.

21. *Id.* at 585-95.

22. Professor Harris directs her attention to essentialism in feminist theory. It is Professor Crenshaw who also critiques antiracist theory and makes this point. Crenshaw, *supra* note 14, at 141-52, 160-67.

23. *Id.* at 149.

acting independently of the other. The effect of this different harm in the law is the systemic failure to recognize that Black women have been injured by each force. It also imposes the impossible burden of sorting out for the judicial system what harm was caused by racial discrimination so that they are essentially like Black men, what harm was caused by gender discrimination so that they are essentially like white women, and what harm was added by the force or confluence of the forces that uniquely affect them as Black women.

Professor Crenshaw raises an additional point. When it comes to discrimination, Black women may claim membership in at least three classes.[24] First, they belong to the class injured by the force of racial discrimination. Second, they are members of the class injured by the force of gender discrimination. Finally, they are members of the class injured by the combined forces of racial and gender discrimination. But Professor Crenshaw goes a step beyond when she argues that "sometimes, [Black women] experience discrimination as Black women."[25] She is arguing that there is a force of discrimination that acts only on Black women. Black women are the only members of the class so affected.

Professor Harris's use of essentialism allows me to make the point in a different way. As I stated above, she sees the law as treating the experiences of Black women as a mixture of independent experiential elements that may be acted upon separately by the forces of discrimination without regard to the other elements. If the mixture were actually a compound or solution, it would have properties that are different from the sum of the properties of the individual elements. Those new properties might cause it to be subject to forces that would not act upon the individual elements. I can not say whether this force is a force of racial discrimination or of gender discrimination or something entirely different. Perhaps, by so stating, I have committed the same offense to which Professors Crenshaw and Harris are so critical. Nevertheless, I honestly do not know.

These propositions may be observed in the context of gender equity. The current law of gender equity provides a remedy to Black women, but only to the extent they are injured by the force of gender discrimination like that faced by white women. It does not provide a remedy to them to the extent that their participation in competitive athletics is and has been impacted by the force of racial discrimination or the simultane-

24. *Id.*
25. *Id.* at 149.

ous action of both forces. Nor does the law of gender equity provide them a remedy to the extent such participation has been impacted by any force of discrimination directed specifically toward Black women.

II. GENDER EQUITY - THE ELABORATION

A. Single Axis/Essential Element

In this section, I will examine the single axis of gender and the "essential women" aided by the law of gender equity. The phrase "gender equity" was coined to describe efforts to use the law to address the historical imbalance in the treatment of girls and women in athletics in the twentieth century. Although men played some role in that historical imbalance,[26] the record shows that women physical educators controlled athletic programs for women in and outside of educational institutions during the first half of this century.[27] Those women held and were influenced by the now discredited view—some prefer the term "myth"—that "women were too fragile to engage in strenuous physical contests."[28] They, accordingly, designed athletic programs for women that emphasized exercise. Furthermore, they abhorred the commercialization of the male intercollegiate competition model and therefore minimized competition.[29] Athletic programs in high school systems mimicked the collegiate systems. The result was a dearth of competitive opportunities and resources for women.

The historical record for Black women is somewhat similar, but varies to some degree. They started defying the taboos against women participating in physically strenuous competitive sports after World War I. Tuskegee Institute established an extremely successful women's track program in 1927.[30] Most of its competition came from northern track clubs that were not affiliated with universities.[31] Tennessee State University assumed the mantle at the end of World War II with its famous Tigerbelles.[32] I use the track programs as examples because of their historical significance to Black womens sports. Sports for Black women

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26. The Olympic movement did welcome them with open arms. Olson, *supra* note 1, at 109.

27. *Id.* at 110.

28. *Id.*

29. *Id.*

30. 2 ARTHUR R. ASHE, A HARD ROAD TO GLORY 74-76 (1988).

31. *Id.* at 77. Wilberforce University was its major collegiate rival. *Id.* at 78. Athletic programs for men or women at the historically Black colleges at that time were few in number. *Id.* at 74.

32. *Id.* at 78.

were affected by general attitudes on women's athletics.[33] However, an equally, if not more important barrier to the participation of Black women in athletics was the necessity of work.[34]

The term "females" is broad enough to include Black girls and women, yet other factual circumstances indicate that the "essential" girls and women contemplated by gender equity laws are white. Most current legal discourse dwells exclusively on Title IX. I, however, will begin with the Equal Protection Clause because it provides the jurisprudential underpinnings for gender equity principles, and Section 1983 because it was used by litigants prior to Title IX. Governmental involvement may constitute the plane of activity, but the dimension on that plane which gives rise to the litigation is gender. Equal Protection jurisprudence frequently has been used by girls and women to obtain the right to participate in athletics.

Gender equity case law under the Equal Protection Clause frequently has arisen in cases involving school systems. At the high school level, application of the Equal Protection Clause leads to the basic proposition that whatever sport a school district makes available to one gender must be made available to the other.[35] The proposition is the rule when girls sue but it is not always the rule when boys sue. It seems that school districts already offer ample participation opportunities for boys and the courts are trying to increase the participation opportunities for girls. So to some extent a constitutional rule favoring girls but not boys may be justified as a rule for the remediation of past discrimination.[36]

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33. For example, two barnstorming Black womens basketball teams emerged after World War I, both of which used standard six-player half-court womens rules. *Id.* at 45.

34. Carole A. Oglesby, *Myths and Realities of Black Women in Sport, in* BLACK WOMEN IN SPORT 5 (T. Green et. al. eds, 1981). Arthur Ashe provides an historical account of the 1920s:

> Most Black women spent very little time in competitive organized sport. They worked in the home with few appliances of convenience. There were no washers and dryers, no dishwashers, no disposable diapers, and the average workday was twelve hours long. In the South, two-thirds of all Black women who worked outside their own homes did so as domestics in the homes of whites. The only time for recreation were Sunday and Saturday afternoons.

Ashe, *supra* note 30, at 75.

35. Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973); Hoover v. Meiklejohn, 430 F. Supp. 164 (D.Colo. 1977). Courts have split over whether schools must do the same for boys. Kleczek v. Rhode Island Interscholastic League, 612 A.2d 734 (R.I. 1992) (boys do not have right to participate on girls teams); Williams v. School Dist. of Bethlehem, 799 F. Supp. 513 (E.D.Pa. 1992), *rev'd*, 998 F.2d 168 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 689 (1994) (boys have the right to participate on girls teams).

36. However, a school district that has a well developed program for girls does not have a defense if a girl wants to play a sport that is only offered to boys.

The remediation of past discrimination also explains the judicial and regulatory interpretation of the Equal Protection Clause and Title IX to permit "separate but equal" teams based on gender. By permitting girls only teams, a school district necessarily discriminates on the basis of gender, but does so in order to increase the participation opportunities offered to girls. Yet, the existence of separate teams raises questions about the extent to which gender equity also encompasses the quality of participation opportunities. Some girls in some sports are capable of competing with the boys. They should be allowed to do so if the assumption that the boys' competition offers a higher level of competition is true.[37]

These legal rules surely have meant more athletic opportunities for Black girls. They have increased opportunities in secondary school systems. They can participate in whatever athletic programs are operated by schools located in their communities, including basketball, field hockey, golf, lacrosse, fast and slow pitch softball, soccer, tennis, track and wrestling. Such participation allows them to obtain the training and skill development necessary to move on to higher levels of competition at the collegiate level. Moreover, even though professional sports opportunities in the United States are limited, there is Olympic competition available and professional opportunities abroad. The probability of women making an Olympic team may be less than that of men making it to professional sports competition because the Olympics occur once every four years.

Section 1983 constraints also arise out of Equal Protection jurisprudence and are triggered by the presence of government sponsorship or the use of public facilities. Thus, girls are permitted to play in Little Leagues that use municipal ballfields.[38] Black girls benefit from these rules as well. They have the right to participate in athletic competition organized by noneducational institutions for boys if separate teams are not available. Thus, they have the right to play on Little League Baseball teams and Midget League Ice Hockey teams. Here again, they may have opportunities for training and development in sports such as basketball, figure skating, golf, gymnastics, soccer, softball and tennis where

37. Yellow Springs Exempted Village School Dist. Bd. of. Educ. v. Ohio H.S. Athletic Ass'n, 647 F.2d 651 (6th Cir. 1981); O'Connor v. Board of Education, 545 F. Supp. 376 (N.D. Ill. 1982); Ritacco v. Norwin School Dist., 361 F.Supp. 930 (W.D. Pa. 1973).

38. Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975) (Little League utilizing public park may not exclude on the basis of gender under 42 U.S.C. § 1983); *accord* Nat'l Org. of Women v. Little League Baseball. Inc., 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974) (Little League exclusion on the basis of gender invalidated under state public accommodations statute).

available. As their skills develop, those Black girls who participate have upward mobility to higher levels of competition within the respective amateur systems.

Neither the use of the Equal Protection Clause nor section 1983 to advance the position of girls alleviates the force of racial discrimination acting upon Black girls in the sports context. The gender equity jurisprudence gives them the right to participate where there are opportunities; it does not create opportunities in general where there are not already existing opportunities for boys or require the expenditure of resources where they are not already expended for boys. To the extent that Black boys lack opportunities or resources as a result of racism, gender equity often provides no remedy for Black girls.

Without question, Title IX's single axis is gender. Although the legislative history for the law is sparse, contemporaneous writings about the legislation as it applies in the sports' context indicate that a major objective of the law was the correction of an imbalance in the treatment of girls and women. The legislation, however, is limited; it applies only on the plane of sports produced by educational institutions that receive federal funding. The statutory command is simple: "Educational institutions do for girls and women what you do for men and boys."

Moreover, the nature of the law's command adds another limitation. The law constrains individual educational institutions with respect to girls and women who are their students.[39] Thus, Black girls and women receive the benefits of the law only with respect to the institutions at which they matriculate at any point in time.[40]

At the time Title IX was enacted, the law's command "Educational institutions do for girls and women what you do for men and boys" meant a rather pernicious reality for Black girls and women. The Amer-

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39. Gender equity law is directed toward institutional compliance and not societal compliance. Theoretically, gender equity in collegiate athletics exists when every college, university and junior college is in compliance. Even if every institution were in compliance with Title IX, the opportunities for Black women would vary from institution to institution.

40. *See* Wilde, *supra* note 9, at 251-53 for an interesting institutional based gender equity compliance model. His model does not review the implications for Black women or other women of color. Wilde, in reviewing contemporary institutional responses to gender equity compliance, notes that one institution, Brooklyn College, dropped its athletic program. *Id.* at 244. I venture to say that if every institution of higher learning dropped its athletic program, organized athletic competition for men would still exist. Somehow the conceptual boundaries of the institutionalized obligation to achieve gender equity does not work for me. Some readers may assert that it is unlikely that all institutions, or even a significant number of institutions, would go as far as Brooklyn College. However, other forces within major college athletics are, in fact, leading to divestiture of the mens' revenue producing sports and building momentum at this very moment.

ican educational system at all levels was highly segregated. Despite vast changes in the political ethos and special admissions policies, that condition largely continues.[41] White girls would have been entitled to whatever their white school or university did for boys and Black girls would have been entitled to whatever their Black school or university did for boys. Most participation opportunities at the collegiate level were at predominantly white colleges; most resources were at predominantly white universities. The same picture existed at the elementary and secondary school level.

But all did not stay the same. The Civil Rights Era saw increased efforts to use the legal system to combat the force of racial discrimination. *De jure* racial segregation in America was invalidated under the Equal Protection Clause in *Brown v. Board of Education*.[42] Congress continued the attack with several pieces of civil rights legislation, one of which was Title VI of the Civil Rights Act of 1964.[43] Title VI prohibits discrimination on the basis of race in educational systems receiving federal funds. Elementary and secondary schools were desegregated by judicial decree. Race based affirmative action policies in admissions were adopted at most predominantly white NCAA institutions.

Black women benefitted from these efforts along with Black men. The legal tools to fight the forces of racial discrimination did not, however, regulate the force of gender discrimination confronting Black women. This was true in the sports setting as well. When Title IX was added to the antidiscrimination arsenal of Black women, they should have immediately reaped significant benefits in the sports arena. Instead a remarkable irony occurred.

Integration provided white educational institutions with access to the elite Black male athletes at all levels of the educational system.[44] Since athletic programs in those days favored men, notwithstanding Title IX, the white educational system increased the number of athletic participation opportunities for which Black males were eligible to compete.[45] No

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41. *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES (1991) (on contemporary segregation in public school systems); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1409-10 (1993). *See also* Davis, *supra* note 10, in which the author describes the history of racially segregated sports in the United States and argues that racism continues to affect intercollegiate athletics.

42. 347 U.S. 483 (1954).

43. 42 U.S.C. § 2000d (1994).

44. *See infra* note 70 and accompanying text.

45. When formerly exclusively white sports systems open their doors to Blacks, its Black counterpart often dies. That was the case of Major League Baseball. Some of this happened

longer were they limited to competing for the participation opportunities in the historically Black universities, but they were then eligible to compete for opportunities in historically white institutions as well. White men, who previously had been able to compete for those opportunities without competition, would have been displaced, not by women, but by Black men, unless universities expanded their athletic programs. Laws regulating the force of racial discrimination also provided Black women with the right to compete for those opportunities that were available to women in predominantly white universities. They had an equal right to compete for participation opportunities that were in very short supply.

Even though more Black women are in college than Black men, Title IX did not, and does not, mean that Black women are entitled to the same treatment as Black men, except at the historically Black universities. Historically, Black colleges and universities are subject to the mandate of Title IX.[46] To the extent that Title IX requires participation numbers to mirror the gender composition of an institution's student body, Black women would be entitled to more participation opportunities than Black men at many historically Black institutions. A predominantly white university, on the other hand, need not provide Black women with participation opportunities that mirror the gender composition of its Black student body. Because such an institution may comply with Title IX by increasing participation opportunities for white women, it is possible that Black women suffer no gender discrimination at the hands of a university which so complied.

I am not saying that Title IX has not been beneficial to Black women for, indeed, it has. It has increased their participation opportunities at the collegiate level. In 1978, for example, there were 1,012 Black women participating as athletes in intercollegiate athletics out of 17,298 women

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with integration in the educational systems. Black leagues at the secondary level were abolished as the Black schools that sponsored them were closed. Black college sports survive, because Black colleges survived integration. Some Black noneducational sport systems also have survived. The American Tennis Association, which produced Arthur Ashe, Althea Gibson and numerous others, was formed in 1916 and is the oldest Black sports organization in the United States. Eric Smith, *A.T.A. Junior Development Program*, BLACK ENTERPRISE, Sept. 1995, at 115.

46. Athletic programs at historically Black institutions have their problems with gender equity compliance. South Carolina State University's program was certified conditionally by the NCAA in 1995; the condition: adopt a plan to improve the graduation rate of women athletes. Sal Ruibal, *Craven drives off with rookie award*, USA TODAY, Nov. 17, 1995, at 3C. Howard Universiy lost a significant sex discrimination suit in 1993 involving the coach of its women's basketball team. Christine Brennan & Mark Asher, *Title IX Award Stirs National Reaction: $2.4 Million to Howard Women's Basketball Coach*, THE WASH. POST, June 26, 1993.

in some 213 colleges and universities surveyed.[47] Another study found 2,760 Black women on athletic scholarships in NCAA Division 1 institutions in the 1990-91 school year.[48] I am saying that the efficacy of Title IX to remedy the historical station of Black women in sports is limited.

Since most universities provide more participation remedies and resources to sports for men, Title IX requires universities to increase the opportunities available for, and the resources, expended on women in their intercollegiate athletic programs. Accordingly, many colleges and universities have sought to comply by adding sports for women to comply with Title IX's definition of equality as equal participation numbers and resources. The NCAA, which opposed the enactment of Title IX,[49] has now elevated gender equity to a major governing principle.[50] That principle is also oriented to the single axis of gender. As part of its redemption, the NCAA created a task force which issued a report in 1993.[51] The NCAA Gender-Equity Task Force identified several sports for women that universities may consider for compliance purposes. These included ice hockey, rowing, synchronized swimming, team handball, water polo, archery, badminton, bowling and squash.[52] Black women in the inner city and from low-income backgrounds do not have access to the training and development necessary to compete for collegiate opportunities.[53]

Congress has been inconsistent in its attention to the intersectionality issue. The Student Right to Know Act compels universities to report the graduation rates of student athletes by race and sex.[54] But the Equity in

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47. Debra E. Blum, *Forum Examines Discrimination Against Black Women in College Sports*, CHRON. OF HIGHER EDUC., Apr. 21, 1993, at A39.

48. Robertha Abney and Dorothy L. Richey, *Opportunities for Minority Women in Sport—The Impact of Title IX*, J. PHYS. ED. REC. & DANCE, Mar. 1992, at 56.

49. NCAA v. Califano, 444 F. Supp. 425 (D.Kan. 1978), *rev'd*, 622 F.2d 1382 (10th Cir. 1980).

50. NCAA CONST. art. 2.3 (1995-96).

51. Final Report of the NCAA Gender-Equity Task Force, National Collegiate Athletic Association (July 26, 1993).

52. NCAA Gender-Equity Task Force, *Achieving Gender Equity A Basic Guide to Title IX for Colleges and Universities* 51 (1994). Interestingly, bowling was the most popular sport of Black women after World War II. A 1981 compilation showed that Black women had high participation in three sports: basketball, track and field, and volleyball. That same compilation showed that Black women had very low participation numbers in most, if not all, of the emerging sports. Tina Sloan Green et al., *Real Problems and Real Solutions*, *in* BLACK WOMEN IN SPORT, *supra* note 34, at 49.

53. Tina Sloan Greene, *The Future of Black Women in Sport*, *in* BLACK WOMEN IN SPORT, *supra* note 34, at 71.

54. Pub. L. 101-542, codified at 20 U.S.C. § 1092(e) (Supp. 1995).

Athletics Disclosure Act (Equity Act)[55] uses the single axis approach requiring universities to disclose financial data along gender lines. At the same time and in the same legislation in which it adopted the Equity Act, Congress also passed the Women's Educational Equity Act of 1994.[56] That law explicitly employs a multiple dimension approach and provides that its purposes include the promotion "of equity in education for women and girls who suffer from multiple forms of discrimination based on sex, race, ethnic origin, limited-English proficiency, disability, or age."[57]

B. Multiple Dimensions

My writing about the effect of the forces of racial and gender discrimination on Black women in the athletic arena arrives rather late. One Black woman scholar and athlete wrote in 1981 with defiance and hope: "[B]lack women deal with the double burden/challenge of prejudice concerning both sex and race."[58] What I have added above are the insights provided by Professors Crenshaw and Harris on the inefficacy of laws, like Title IX, that separately target the force of gender discrimination to remedy harm caused by a confluence of the forces or by a unique force of discrimination against Black women.[59] I also have offered proof of their further observation that the conjunction of laws which separately target gender or racial discrimination do not provide an adequate remedy either. That result should occur if the confluence of the forces or a unique force generates harm to Black women not produced by either force independently of each other. An understanding of the true nature of the discriminatory force or forces, thus, is essential to the development of antidiscrimination jurisprudential theory, but more importantly, it aids the development of a remedy for that harm.

I have already demonstrated that Black women do suffer from the confluence of gender and racial discrimination forces in the sports context. Let me summarize. Black women have had to overcome two specific prohibitions: "No Blacks Allowed" and "No Women Allowed."[60] Black women are adversely affected by both signs, yet taking down the

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55. Pub. L. 103-382, codified at 20 U.S.C. § 1092(g) (Supp. 1995).
56. Pub. L. 103-382, § 101, 108 Stat. 3695, codified at 20 U.S.C. § 7231 *et seq.* (Supp. 1995).
57. 20 U.S.C. § 7232(3) (Supp. 1995).
58. Oglesby, *supra* note 34, at 1.
59. I have provided a cursory argument that laws specifically targeting racial discrimination also do not provide an adequate remedy.
60. Racism and sexism connote more than discriminatory exclusion. They include a wide range of discriminatory behavior. *See generally* Davis, *supra* note 10.

former sign does not prevent or remedy the harm caused by the latter. Nor does removing the latter prevent or remedy the harm caused by the former. Finally, removing both signs does not remedy the harm caused by the effect of both signs together.

The more difficult case is whether there exists a unique force aimed directly at Black women. Consider the case of an express prohibition against the participation of Black women. What if a particular sporting activity had a "No Black Women Allowed" policy? At first glance, the obvious conclusion is that such a prohibition can not stand. If it were so obvious, the articles by Professors Crenshaw and Harris, while they may have been written in the pursuit of intellectual curiosity, would have been unnecessary. In fact, this type of policy is the subject of *DeGraffenreid v. General Motors*,[61] a Title VII case cited by Professor Crenshaw in which the court refused to recognize Black women as a suspect class apart from Black men.

This issue was tackled in *Shuford v. Alabama State Board of Education*,[62] involving both Title VII and Title IX. In *Shuford*, a Black male brought a class action suit under Title VII challenging employment and promotion practices relating to presidential, faculty, administrative, and supervisory positions in a state's postsecondary educational system. Prior to the approval of a consent decree settling the racial discrimination claims, four women intervened to raise similar employment related sex discrimination claims under Title VII and Title IX. Two Black women also intervened on behalf of a sub-class of "Black female professionals." The court allowed the Black women to intervene and in approving a modification of the original consent decree recognized that Black women were subjected to a unique form of discrimination.[63]

The existence of a unique form of discrimination directed specifically at Black women was also recognized in *Jefferies v. Harris County Community Action Association*.[64] My point though is that even if a unique force may exist, the injury caused by it does not appear to be different

61. 413 F. Supp. 142 (E.D. Mo. 1976), *aff'd and rev'd in part*, 558 F.2d 480 (8th Cir. 1977).

62. 897 F. Supp. 1535 (M.D. Ala. 1995).

63. "The sub-class of black women is a distinct group, subject to discrimination based on a dual status as blacks and women that neither white women nor black men receive." *Id.* at 1568. Judge Thompson relied upon his own precedent, Sims v. Montgomery County Comm'n, 766 F.Supp. 1052, 1099 n.131 (M.D.Ala. 1990), for this conclusion. In that footnote, he wrote:

> Black female officers employed by the Sheriff's Department are in an especially precarious position because they are subjected to both sexual and racial harassment . . . [T]hey are also subjected to additional discrimination because of their dual status which neither the white female officers nor the black male officers must bear.

64. 615 F.2d 1025, 1032-35 (5th Cir. 1980).

from the harm caused by the confluence of forces. While the "No Blacks Allowed" sign also affected Black men and the "No Women Allowed" sign also affected white women, only Black women were adversely affected by both signs. Similarly, the "No Black Women" sign only affects Black women. This was indeed the point made by *Jefferies*. The harm may not, in fact, be different from that incurred by Black men who suffer from racial discrimination or white women who suffer from gender discrimination. The key question is whether the law will provide a remedy to Black women when they are the only ones who suffer harm, regardless of its magnitude and scope, from a specific confluence or type of discriminatory force.[65]

The problems of harm and remedy as they apply to Black women can not be fully comprehended without some picture of the multiple dimensions of the sports landscape. Organized sports competition in the United States may be divided into amateur and professional sports. The law of gender equity has been developed largely in the area of amateur athletics. Amateur athletics can be divided into two systems: athletics sponsored by educational institutions and athletics sponsored by non-educational institutions.[66] Although the formal structures of both systems are separate, athletes may move in and out of both systems almost at will. Moreover, both systems have competitive levels ranging from beginners to elite.[67] As athletes age and improve their skills levels, they

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65. "Recognition of black females as a distinct protected subgroup . . . is the only way to identify and remedy discrimination directed toward black females." *Id.* at 1035.

66. Olson argues that Title IX is flawed because it is limited to the educational system. Olson, *supra* note 1, at 107. Her characterization of sports regulated by noneducational institutions as the recreational system misses the mark. *Id.* at 115. As shown in the text, the noneducational amateur system offers highly competitive athletics as well. Heckman similarly refers to noneducational systems as "community recreational leagues or programs." Heckman, *supra* note 3, at 5. Not all such programs or leagues are part of a formal competitive system.

67. The most visible of the noneducational systems is the Olympic system governed by the United States Olympic Committee created in 1950. The USOC was established as the "coordinating body for amateur athletic activity in the United States directly relating to international amateur athletic competition" by the Amateur Sports Act of 1978, P.L. 95-606, 92 Stat. 3045. H.R.Rep. No. 95-1627, 95th Cong.2d Sess. 14 (1978). That act resolved some of the jurisdictional squabbles between the NCAA and the Amateur Athletic Union, another noneducational sports organization with a long history in amateur sports in the United States. Underneath the USOC, amateur sports at all levels are regulated by numerous sport specific organizations. The result is recreational and competitive leagues governed by non-profit associations as well as those sponsored by municipalities. Players graduate from Little League Baseball to Civic League to the American Legion. In the school system, players may begin in junior high school, then high school, then college. Some players may participate in both systems. Players may move out of the amateur systems at the American Legion or high school level. Girls may begin in Little League, but often move up in fast or slow pitch softball.

advance to higher levels. The Olympics and professional sports constitute the highest levels.[68] There is a third system: the playground.[69] The playground provides competition that generally is devoid of adult supervision and organization. The playground provides a brutal but supportive environment for skill development. There is no practice. Feedback comes from the repetitious playing of games. The better playground players have upward mobility into higher levels of organized competition, especially those sponsored by educational institutions.

Historically, all three amateur systems have been racially segregated. The racial practices of those systems can not be separated from the broader society. Thus, Black athletes, male and female, were largely excluded from white collegiate and higher level noneducational amateur systems until the World War II era outside the South and the Civil Rights Era in the South.[70] The opportunity to compete for participation opportunities in white secondary systems and the lower levels of the noneducational systems came in the Civil Rights Era.[71] Until then,

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Organizations such as the United States Figure Skating Association sanction competitions from beginners to the Olympic level.

68. Professional sports are generally not available for women. There are two quadrennial Olympics: summer and winter. The winter Olympics feature sports which Black women historically have not had access due to financial or other socio-economic reasons.

69. The playground is used loosely to describe any sort of recreational sports competition which is not organized into formal competition. It may be made available in municipal parks, recreation centers, country clubs, etc.

70. Davis, *supra* note 10, at 633 nn. 81 & 85. The participation of Black athletes in white colleges in the North existed prior to World War II, but increased substantially in the 1930s. Restrictions also existed in noneducational amateur systems. *See* Farrall v. Dist. of Colum. Amateur Athletic Union, 153 F.2d 647 (D.C. Cir. 1946) (in which Blacks challenged a rule prohibiting mixed race competitions in the District of Columbia). The integration of Black males into the predominantly white collegiate system in the South began in earnest after events of the 1960s, such as Texas Western University's (now University of Texas at El Paso) victory in the 1966 NCAA basketball championship with an all Black starting five. Integration had begun in southern programs before the University of Southern California defeated the University of Alabama in 1970. However, Paul "Bear" Bryant's quote still looms large: Sam Cunningham, the USC fullback, "just did more for integration in the South in 60 minutes than Martin Luther King did in 20 years." Mark Blaudschun, *Removing the Barrier*, BOSTON GLOBE, Aug. 26, 1994, at 40.

71. In the South prior to Civil Rights Era, the separate school systems had their own regulatory association. For example, white secondary schools in Virginia belonged to the Virginia High School League and Black schools belonged to the Virginia Interscholastic Association. Tom Robinson, *A League of Their Own*, THE VIRGINIAN-PILOT AND THE LEDGER-STAR, Feb. 22, 1993, at C1. The two leagues did not merge until 1969. *Id.* One of the early Equal Protection cases in sports law involved the attempt by a Black private school to join the white Louisiana High School Athletic Association. Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968). Similar issues arose in noneducational amateur systems as well.

Black athletes had no alternative but to develop in the Black amateur system. Not only were the educational systems segregated, but so were residential neighborhoods.[72] Notwithstanding *Brown v. Board of Education*[73] and a vast array of civil rights laws and judicial precedents, separate systems continue to exist. College athletic conferences are still comprised exclusively of either historically white institutions or historically Black institutions.[74] Although *de jure* all Black primary and secondary schools have disappeared, such schools continue to exist because of residential segregation, which has actually increased.[75]

Neighborhoods, regardless of their racial or ethnic character, have decidedly pronounced socio-economic dynamics. The resources available in all three systems are a function of those dynamics. Athletic competition in affluent neighborhoods will have more resources available. Conversely, athletic competition in low-income neighborhoods will have far lesser resources available. Resource allocation affects the quality of the facilities for training and playing the competitions, the availability of coaching as well as the preparation of individual coaches for their work and the types of athletic competition available. All of these factors influence the sports in which children in the neighborhood may have upward mobility. The more affluent the neighborhood in which a girl grows up, the more participation opportunities she will have available at the upper levels.

The case of the express prohibition in the sports context is merely hypothetical. History shows that black women have been elite athletes in the educational and noneducational amateur systems. The late Arthur Ashe in his seminal work, *A Hard Road to Glory: A History of the African-American Athlete 1919-1945*, recounted the record of Black women as amateurs and professionals in basketball and baseball, track, tennis and bowling. Wilma Rudolph in track and Althea Gibson in tennis are legends. Any authoritative history of African-American women will also include such names as Alice Coachman, Wyomia Tyus and Ora Washington. Contemporary names include Zina Garrison, Flo Hyman, Florence Griffin Joyner, Jackie Joyner-Kersee, Lori McNeil, Cheryl Miller, Debi Thomas, and Gwen Torrence.

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72. Some park systems maintained by municipalities were also segregated. *See* Evans v. Newton, 382 U.S. 296 (1966); Evans v. Abney, 396 U.S. 435 (1970).

73. 347 U.S. 483 (1954).

74. *See generally* OCANIA CHALK, BLACK COLLEGE SPORT (1976) for, among other things, a history Black college intercollegiate competition in baseball and football.

75. Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehichle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595 (1995).

Like all women, their current athletic opportunities are a function of the historical suppression of competitive athletics for women. That means they face fewer participation opportunities at the higher competitive levels and smaller amounts of resources. Like all women, they face very limited professional opportunities when they reach the amateur peak. The dearth of opportunities is compounded by the historical segregation of Black athletics from white athletics. The Black system was deprived of resources but not the competitive spirit. Black women were locked into a system that did not offer them very many opportunities as women and when it did it had very few resources for them.

Like Black men, they encounter stereotyping and stacking[76] within the sports world which steers them into basketball and track.[77] The steering into basketball and track and away from other sports reduces the participation opportunities for which they may compete. The problem goes beyond racial steering. Training and development at the higher levels of competition in other sports depend upon access to the lower levels of organized competition in those sports. Sports such as ice hockey, field hockey, tennis, and golf have socio-economic dimensions that limit their accessibility to Black girls at the lower levels of the amateur systems. There are no public facilities and private country and recreation clubs are out of the question. These barriers will fall only when they have access to the lower level systems that train and develop athletes for competition at the higher levels. Increasing the opportunities at the higher levels provides role models for young Black girls, but the power of the role models is limited. The impact of this structural problem on Black men is muted by the presence of football.[78] Like Black

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76. Stacking is the term used to describe the assignment of Black players in some sports to particular positions that stereotypically utilize natural ability and white players to those that stereotypically require thinking. Norman R. Yetman & D. Stanley Eitzen, *Racial Dynamics in American Sport: Continuity and Change*, *in* SPORT IN CONTEMPORARY SOCIETY 325-32 (1984); *see also* Oglesby, *supra* note 34, at 7, where author discusses stacking of Black women.

77. This has been an historical problem. One commentator wrote in 1981 of the clustering of Black women in basketball and track along with the expectation that Black women be super athletes. Oglesby, *supra* note 34, at 5-6. The stereotyping still prevails. Blum, *supra* note 47, at A39.

78. Football programs offer a large number of participation opportunities. The numbers of players on the field at any one time, eleven, is large. Platooning players on offense and defense results in at least twenty-two starters. Then add to that a punter, a field goal kicker and a special team for punts and kick-offs and the numbers grow even larger before the substitutes are even considered. Since many boys are willing to participate merely as practice players, big time programs carry teams of over 100 players. Wilde, *supra* note 9, at 249. Black males are steered into football and stacked into the "skill" positions. The net effect is that football provides participation opportunities that compensate on an over-all basis, but not on

men, they face discrimination in obtaining coaching and administrative positions in universities and governing bodies.[79]

However, their participation levels at the high school and the collegiate stages lag behind other identifiable categories of women and men.[80] And Black women, as a group, appear to derive the least amount of benefits from athletic participation.[81] Theories for these differences abound, including the necessity of work and the absence of professional sports.[82] My own hypothesis is that their participation opportunities are also adversely affected by discrimination specifically aimed at Black women. In a racially integrated setting, they may not be selected for teams at higher rates than other groups because they are often viewed as women who least typify the essentialist norm.[83] The racial steering argument lends support to this conclusion. As Black women are steered into some sports, they are steered away from others. The participation of Black women may also be affected by the availability of adult supervision and training when they are girls.

III. BLACK WOMEN EQUITY - THE REMEDY

In this section, I hope to provide a general framework for the development of legal rules and sports policy for the equitable treatment of

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an individual basis, for the small number of opportunities made available to them in other sports.

79. The lack of upward mobility in coaching and administrative positions is a major issue with Black women athletes. Addressing this issue is a priority of the Black Women in Sports Foundation. See comments of Tina Sloan Green and Dr. Alpha Alexander in Bob Molinaro, *Fight is on vs. 'Isms in Colleges*, THE VIRGINIAN-PILOT AND THE LEDGER-STAR, Sept. 19, 1993, at D1. The lack of such opportunities somewhat epitomizes the failure of Title IX and gender equity to address their grievances. The Cheryl Miller/Marianne Stanley controversy is a case on point. Cheryl Miller is, perhaps, the greatest player in the history of womens intercollegiate basketball. She was subjected to derision by the gender equity establishment, however, when she agreed to accept the head coaching position at her alma mater, the University of Southern California. The position was available because Marianne Stanley, her predecessor, was dismissed in a contract dispute in which she demanded that she be paid compensation comparable to the coach of the mens basketball program. For details, see *USC's Miller in a Touchy Situation*, ARIZONA REPUBLIC, Dec. 8, 1993, at D2; Vic Dorr, Jr., *Despite Departure of Stars, Program at Maryland Shines*, RICHMOND TIMES-DISPATCH, Dec. 2, 1993, at C6.

80. Olson, *supra* note 1, at 127-29.

81. Crenshaw, *supra* note 14, at 139-40.

82. *See* text *supra* at 10-11 and *supra* note 14.

83. Olson writes about the mainstream history of the dilemma women athletes faced in enjoying their participation and also gaining acceptance as women. Olson, *supra* note 1, at 119. She does not add the racial dimension on this point. Oglesby, perhaps, touched on this point when she wrote of the invisibility Black female athletes. "This monograph had [James] Baldwin not hit upon the idea first, could very well be titled, *'Nobody knows 'her' name: the black American sportswoman.'"* Oglesby, *supra* note 34, at 1.

Black women in sports. I will begin with a critique of the application of the equality model upon which Title IX is founded. One difficulty with the equality model is that it is limited to the remediation of inequality. The model defines the problem to solved. The law is asked to fix the inequality and little else. In the sports context, the model presents some inherent conceptual conundrums where participants seek superiority. The conceptual difficulty is compounded in the case of Black women, where an Equal Protection analysis not only requires the delineation of a suspect class[84] but also a privileged class with which to compare it.

Where the landscape fuses the dimension of race with their gender, it is not so difficult to find a suspect class. Blacks qualify as a protected group and women also often qualify. A subgroup of persons belonging to both should have stronger claims to protected status. As Professor Crenshaw demonstrates, existing law often provides a much weaker claim to protected status for such subgroups. Such results are easy to comprehend if one focuses on broader principles. All persons have racial and gender classifications. A subgroup of persons belonging to both groups include the privileged as well as the subordinated. The problem is how to measure the harm addressed by the Equal Protection Clause. What is the appropriate privileged group to compare an unprivileged subgroup with?

In the sports context, the question would be if Black women as a class are unprivileged, what is the appropriate privileged group? Gender equity, for example, compares women with men. The rule of law largely amounts to "Do for women what you do for men." How should the law complete the following: "Do for Black women what you do for . . . ."? *Degraffenreid* suggests that there is no appropriate comparison group. In any event, I am not aware of any instance in which a court has contemplated completing the sentence with white men.

The legal rule could provide that Black men are the comparison group. In *Shuford*, the court essentially reached this result. The original consent decree adopted an affirmative action program with goals for the hiring and promotion of African-Americans. The court modified the decree to establish goals for African-American women at fifty percent of those set for African-Americans. In analyzing the reasonableness of those goals, it compared African-American women only with African-American men. To comply with a rule of "Do for Black women what you do for Black men," a sports program, whether attached to an educational institution or a noneducational organization, would have to pro-

84. United States v. Carolene Products Co., 304 U.S. 144 (1938).

vide Black women the same right to participate, the same resources available to Black men. This may be the theoretical rule, but I emphasize theoretical, in practice. A city recreational program in the Black community's inner city has to let girls, who include large numbers of Blacks, participate in any organized program. Schools that are predominantly Black must allow girls, who invariably will be Black, to participate with the boys or on teams for girls.

The sentence could be completed with women or white women. Considering that *Shuford* also adopted goals for women in the modified decree, it could have established goals for Black women by reference to their proportion of women in the relevant pool, but it did not. A "Do for Black women as you do white women" rule has some interesting permutations. It would mean that sports programs in both amateur systems would have to provide the same opportunities and resources that are provided to white girls and women by those programs. White girls who live in the suburbs may have more sports programs available to them than are found in the inner city. They may have more resources available, more training opportunities, and better facilities. They may have more sports in which they can ascend to higher levels of competition within the amateur systems. Those same opportunities would have to be provided to Black women.

Both of these rules reach inconsistent results in integrated settings. The regulations under Title IX are premised upon the assumption that interest and ability are evenly distributed across genders. No such assumption exists about race. In fact, the opposite assumption is widely, if not stereotypically, accepted as the norm. Black males, for example, are disproportionately represented in collegiate athletics in football and basketball. Although Blacks comprise about six percent of the student population at predominantly white institutions, they—including Black women—comprise over twenty percent of the student athlete population, mainly in basketball and football.[85] If the rule were "Do for Black women as you do for Black men," predominantly white institutions would have to give a disproportionate share of the womens positions to Black women.[86] If the rule were "Do for Black women as you do for

85. Jeff Schulz, *Lapchick Learns: Race Relations Still Far From Ideal*, STAR-TRIBUNE (Minneapolis), Dec. 20, 1992, at 05C. Data released by the NCAA in 1993 showed that participation of Black athletes dropped from 27 percent before Proposition 48 went into effect to 23.5 percent in the 1986-87 academic year. Doug Tucker, *NCAA Study Paints Bittersweet Picture for Black Athletes*, INDIANAPOLIS STAR, July 2, 1993, at B01.

86. Black women do hold a disproportionate share of participation opportunities in sports such as basketball and track.

white women," then the law permits Black men to have more spots than are given to Black women. Such disparate results are possible only because of the acceptance of "separate but equal" when it comes to gender.

Neither the Equal Protection Clause nor Title IX compels any organization, educational institution, or government to offer a sports program. It merely constrains any such programs offered or sponsored by a government or utilizing public facilities. Although separate gender based teams in a sport are permissible, presumably an affected actor could comply with the Equal Protection Clause simply by offering a uni-sex sports program. The football problem[87] is solved at the high school level because girls must be allowed to play. Some girls avail themselves of this right, but the number does not seem significant. There is much speculation that girls and women would not fare well if the doctrine were abandoned, but no one really knows. In some sports, exceptionally talented girls may, in fact, be better athletes than the boys who routinely occupy seats on the bench.

Interestingly enough, the problem of remedy has surfaced in a case involving a school policy recognizing unique harm incurred by Black boys. In *Garrett v. Board of Education*,[88] the issue was whether the Equal Protection Clause or Title IX permitted the school board to provide redress to the class of African-American boys in the school district. The court was asked to consider African-American males as a protected class. The school board had approved the establishment of "male only" academies to address "the crisis facing African-American males manifested by high homicide, unemployment and drop-out rates."[89] The court's analysis is hampered somewhat by the school board's use of "male only" when the academies were aimed specifically at Black boys.[90]

The court rested its invalidation of the academies under the Equal Protection Clause on the failure of the school board to demonstrate a compelling state interest. Since Black girls suffered harms similar to the harm suffered by Black boys which the school board sought to remedy, the court saw that remedy as imposing an additional harm on Black girls. The remedy, according to the court, blamed Black girls as the causal agent of the harm suffered by the boys.

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87. Womens sports have no counterpart in sports for football, at least in the educational system. Wilde, *supra* note 9, at 249. The participation levels of girls and women in figure skating, perhaps, comes as close as any women's sport does to football.

88. 775 F. Supp. 1004 (E.D. Mich. 1991).

89. *Id.* at 1007.

90. *Id.*

The Title IX reasoning in *Garrett* followed a different path. The court's analysis was much more single axis oriented, much less accepting of the classifications. However, the court used a reverse discrimination approach (my characterization, not the court's). The opinion does not reflect that the court appreciated the idea that Black boys might also suffer from a confluence of discriminatory forces or a unique force directed specifically at them. If so, the harm may be similar to that suffered by either force alone or as someone else suffers. It nevertheless remains true that the Black boys may have suffered in a way that only they could. Black girls may have suffered a similar injury but as a result of different discriminatory forces. Even though the harm may have been similar, the severity and precise contours may also have been different. That is the argument of Black women. If they so suffer, does the law, does the equality model provide any remedy?

Under the court's analysis, a "No Black Boys," and by implication, its counterpart, a "No Black Girls" restriction, presumably could be challenged and remedial efforts beyond invalidation of the restriction might be upheld. The compelling state interest seems to be some sort of least harmful means test. In a legal regime where equality of general classes of people is prized, an effort to remedy a harm suffered by a narrow class of people must be tailored to also benefit or not exacerbate inequalities whose circumstances approximate or closely resemble the remedial class. In *Garrett*, Black girls suffered similar injuries to the boys but from perhaps different forces. The different forces conceptually make for different causes of action, but the harm is so similar, and the forces so similar, that equality model demands a remedy provided to one be provided to the other, less the law create further inequality among them. I think this point is made by Professor Crenshaw in her criticism of the refusal of courts to allow Black women to be class representatives for classes (e.g., Black men or white women) who also suffer from discrimination.[91]

I have shown the inadequacy of the equality model. I am going to sketch a general outline of an alternative regime. I have three basic proposals. First, many questions of gender equity, and Black women equity in particular, should be addressed primarily as questions of sports policy and secondarily as legal questions. I advocate the development of

91. She might further argue, however, that the law could do more for Black women because of existing inequality between them and Black men. I do not think this imbalance exists in all situations and the circumstances in *Garrett* are an example.

unique legal rules in many sports settings.[92] My major complaint is that the legal rules in many bodies of law arose to address peculiar settings and policy considerations not necessarily found in the sports setting. Those legal rules thus come to provide the structure for resolving essentially sports problems and however awkward their application, often dictate sports policy.

Second, I would explore the use of a general tort-like legal regime as opposed to the equality model. The function at the junction results in harm which under basic tort principles should have a remedy. A compensatory damage model poses some conceptual difficulties in the sports setting, but these difficulties are probably not as intractable as those in the equality model. The law need only craft remedies that put Black women in the position they would have been in if they had not been injured by the confluence of forces or a unique discriminatory force. That position can be found or estimated without using comparison groups.[93]

Moreover, the tort model facilitates the incorporation of harm compounded by multiple dimensional characteristics. The eggshell plaintiff rule is an ancient precept in tort law.[94] Remedial rules may consistently with traditional doctrines specifically target Black women in all their multiple dimensions. In doing so, Professor Harris's analysis cautions against the adoption of the "essential Black woman," to which a traditional tort law approach may lead. Other dimensions, most notably community and socio-economic status, must be considered.[95] The disproportionate impact of the necessity of work as a factor in the participa-

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92. Alfred Dennis Mathewson, *Intercollegiate Athletics and the Assignment of Legal Rights*, 39 ST. LOUIS L.J. 35, 39 (1990), in which I propose the development of a common law of intercollegiate athletics.

93. Normative antidiscrimination law often looks to statistical disparity studies not only to prove the amount of damages but show the occurrence of an injury. *Affirmative Action, White House Plan Would Halt New Set-Asides, Give Extra Credit to SDBs in Limited Instances*, 65 Fed. Cont. Rptr. 11 (1996); Drew Days, *Fullilove*, 96 YALE L.J. 453, 478-84 (1987). However, it is not always necessary to use comparison groups to show the amount of damages. *See, e.g.*, J.S. COVINGTON, CORPORATIONS 3-15 (1989), in which the author discusses various methods for valuing businesses, including closely held firms, with no market for its ownership interests.

94. W. PAGE KEETONS ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 291-92 (5th ed. 1984). The basic eggshell or thin-skulled plaintiff rule is "the tortfeasor takes the plaintiff as he finds him." Silva v. Stein, 527 So.2d 943 (Fla. App. 1988). The rule is ostensibly premised on a victim with personal characteristics susceptible to harm beyond that which a "normal person" would incur. Although the rule invokes abnormality, I wish to focus on its use of the multiple personal characteristics of the victim. "Some scholars have interpreted the thin skull doctrine to encompass the plaintiff's physical, mental, or financial condition." Schaefer v. Hoffman, 831 P.2d 897, 900 (Colo. 1992).

95. Oglesby, *supra* note 34, at 4-5.

tion of Black women in sports should be taken into account.[96] Black girls in the suburbs or more affluent neighborhoods and school districts will have more opportunities and resources available than those in the less affluent communities and school systems in the inner cities and rural America. Accordingly, the sports programs targeting Black girls in the inner city would look different from those developed in the suburbs or rural communities. Professor Crenshaw similarly argues that antidiscrimination law and politics "should be centered on the life chances and life situations of people who should be cared about without regard to the source of their difficulties."[97]

Third, modern tort principles can be used as well. My approach would not focus so much on the rights of individual Black women. There is now a developed body of mass tort rules that may be used to fashion large, broad based remedies. Such remedies would not be directed solely at educational institutions. I would address the structure and interrelationships of the amateur systems I have discussed above. Policies must be developed to improve the access of Black girls to training and development in the lower levels of a diverse range of sporting activities.[98] Resources should be allocated to the neighborhoods in which they grow up. If we target our efforts at Black girls, then Black women will have greater opportunity at the higher levels. Title IX does apply to the lower levels of educational systems, but it should be expanded to reach the noneducational systems as well.[99] Toward this end, I would consider some combination of the educational and noneducational systems at the lower levels.[100]

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96. Oglesby, *supra* note 34, at 5. I suspect that the need to work may also be a factor for other women of color and some white women as well.

97. Crenshaw, *supra* note 14, at 166.

98. This point was raised by Carol A. Oglesby in *The Future of Black Women in Sport, in* BLACK WOMEN IN SPORT, *supra* note 34, at 71. A similar point was proffered by Olson when she observed that Title IX does not provide direct benefits to women in the "recreational" system.

99. The duties of national governing bodies approved by the USOC in specific sports include the provision of "equitable support and encouragement for participation by women where separate programs for male and female athletes are conducted on a national basis." 36 U.S.C. § 392(a)(6) (1992).

100. Solving gender equity problems necessarily requires the expenditure of resources. Those who favor lower taxes and less government would probably oppose the use of tax dollars for sports. When Congress enacted the Amateur Sports Act of 1978, it specifically recognized that amateur sports in the United States are distinguishable from those in other countries "by allowing amateur athletics to be a [sic] truly amateur in nature, free from Government funds and dominance." H.R. Rep. No. 95-1627, 95th Cong., 2d Sess. 12 (1978). That is not and was not a true statement, for both the educational and playground systems receive substantial government funding. Perhaps the time has come to rethink how that spending is

The mass tort approach would also recognize that inequities in the allocation of resources in sports programs is a societal problem and should be addressed as such. To the extent that such inequities have resulted from governmental action, the states themselves, and not just educational institutions, should bear some responsibility for the correction of the harm and problems caused thereby. It is a matter of historical record that states segregated Black women by race, and that the states maintained amateur systems in educational institutions that treated girls differently boys in sports programs. The provision of athletic opportunity on an equitable basis to the extent supported by public spending and policies should not be relegated solely to the federal direction and development.

Finally, I would customize legal rules and policies to fit the contours of sports. In *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association*, for example, the regulatory association prescribed rules mandating separate gender teams in middle and high schools to enhance compliance with Title IX by its members.[101] The appellate court held that the obligations of Title IX were imposed on individual educational institutions. The court's interpretation was a correct one. However, sports competition necessitates the formation of such associations in order to produce high level athletic competition. It does no good to order an institution to increase opportunities if few other institutions act similarly. There are other aspects of sport which should be taken into account.

IV. CONCLUSION

Black women are caught in a world that Title IX does not fully address. As I have discussed above, young athletes develop in three systems. No law governs participation opportunities on the playground. But athletes develop in the amateur systems and move up to higher levels as they do. The number of sports in which Black girls can develop competencies is a function of where they live and their socio-economic circumstances. Suppressed opportunities at the lower levels affects the number of athletic choices available at higher levels. There are opportunities in basketball and track that are not very expensive to produce, but the number of those opportunities at the upper levels is somewhat finite.

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allocated. I do not advocate appropriation of the noneducational systems by the educational systems. Rather, I am thinking of some form of partnership.

101. 647 F.2d 651 (6th Cir. 1981).

Although I have focused on Black women, I have no doubt that similar issues may exist for all women of color. The impact of their multiple dimensions may vary, and I would not presume that the precise rule that helps Black women would also help Native American, Hispanic, or Asian women. Inclusive policies would be directed specifically at their needs as well. I believe that diversity of circumstances also exists among white women and rules ought to target the specific needs of subgroups based on their multiple dimensions.

I am not unmindful of the needs of men and the impact that the provision of resources to the development of opportunites for girls and women will have on them. It seems to me that the resolution of these seemingly intractable problems is hindered by the way in which gender equity is conceptualized. Using an equality model to resolve matters causes us to define the problem to be resolved as one of inequality. As usual in the sports world, a legal rule drives major issues of sports policy. The time has come to rethink and redefine what is an American sports problem. Our society, if athletic participation is a valued endeavor, should boldly strive to provide the opportunity to all, whatever their circumstances or experiences may be, to obtain the maximum possible benefits to be thereby derived.